IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 434

MARTIN L. SWEENEY, *Petitioner*,

v.

ELEANOR M. PATTERSON, Trading as the Washington Times-Herald, DREW PEARSON and ROBERT S. ALLEN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

JOHN O'CONNOR,
Counsel for Petitioner.

WILLIAM F. CUSICK,
Of Counsel.

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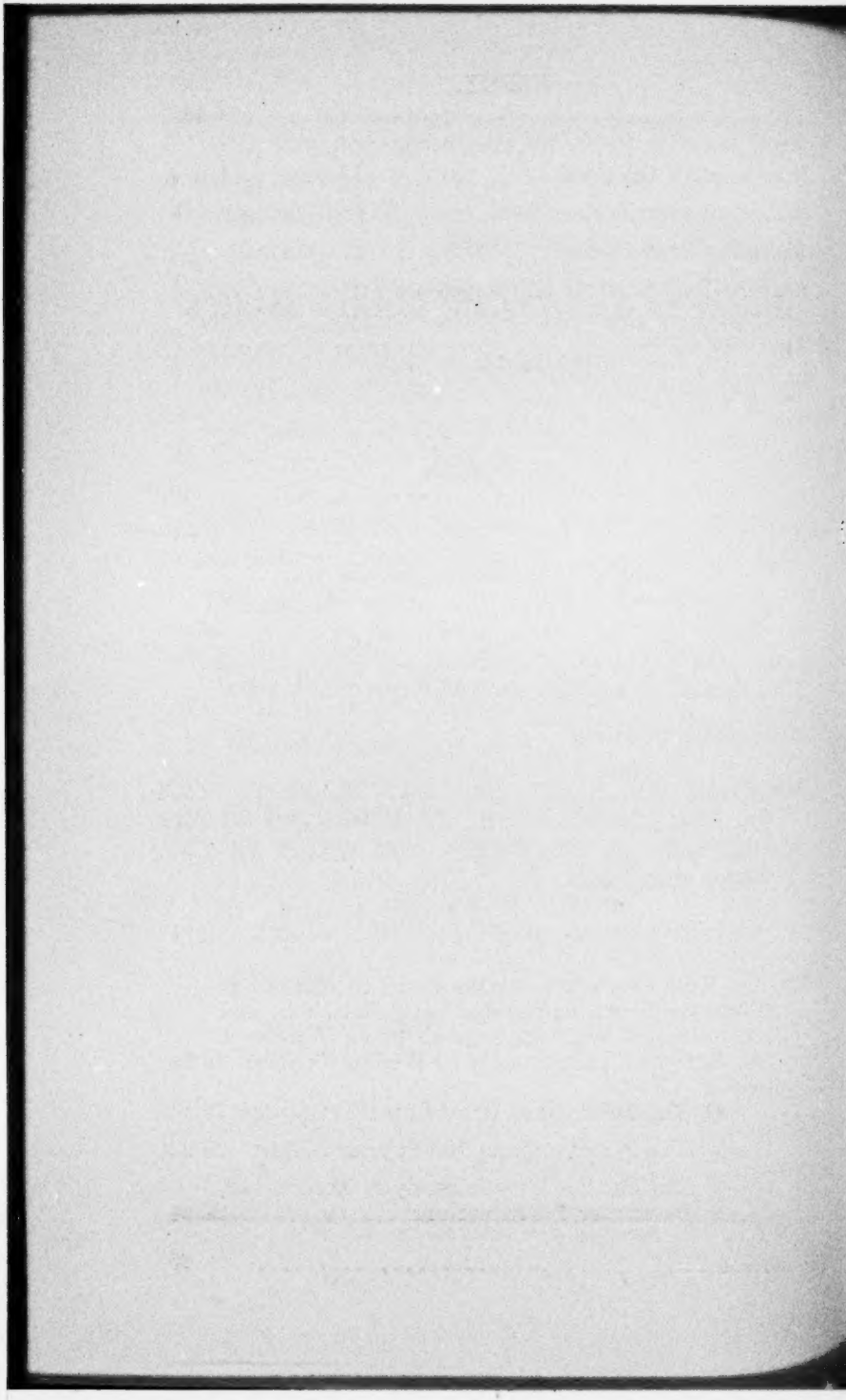

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PETITION.

To the Honorable, the Supreme Court of the United States:

Comes now Martin L. Sweeney, hereinafter styled petitioner, and, applying for writ of certiorari to the United States Court of Appeals for the District of Columbia, respectfully shows:

STATEMENT OF THE CASE.

The petitioner, Martin L. Sweeney, a duly elected member of the Congress of the United States, from the State of Ohio, filed this suit in the District Court of the United States for the District of Columbia (R. 2). The complaint alleged general damages in the sum of $250,000.00, arising out of the publication by respondents Pearson and Allen, in ap-

proximately three hundred and twenty-five newspapers throughout the United States and Territories, and by respondent Eleanor M. Patterson in the newspaper now known as the Times-Herald, having a large circulation throughout the District of Columbia and elsewhere, of the following false and defamatory article (R. 2-5):

(1) "A hot behind-the-scenes fight is raging in Democratic congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.

(2) "The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court.

(3) "This has aroused the violent opposition of Representative Martin L. Sweeney, Democrat of Cleveland, known as the chief congressional spokesman of Father Coughlin.

(4) "Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized 10 years later.

(5) "Justice Department officials say he has made an excellent record as U. S. Attorney, is able, progressive, and was second on the list of judicial candidates submitted by the executive committee of the Cleveland Bar Association. First on the list was Carl Friebolin, whom Justice Department officials say they would have gladly appointed despite his age of 60, had he not eliminated himself voluntarily for physical reasons.

(6) "Two others on the Bar Association's list, Walter Kinder and Harry Brainard were eliminated because of big business or reactionary connections. Last on the list was Dan B. Cull, a former Common Pleas Court judge, and an excellent appointment except that he happens to be a Catholic and the last two judicial appointments in Ohio have been Catholics. So the Justice Department returned to the No. 2 man on the list, a Jew.

(7) "Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment." (The numbering of the paragraphs is ours for convenience of reference).

By innuendo petitioner alleged that the publication meant and intended to convey that he was guilty of racial prejudice against people of Jewish origin and guilty of conduct unbecoming a public officer and all of which held him up to contempt in the eyes of constituents, and clients he represented in a professional capacity (R. 5).

In a bill of particulars petitioner specifically alleged that paragraph One (1) and the first sentence of paragraph four (4) were false in their reference to him; that paragraphs three (3) and seven (7) were false in their entirety; and, as to other matters in the article he had insufficient information to form a belief as to their truth or falsity (R. 5-6).

For answer to the complaint, respondents pleaded a qualified general denial; alleged that the defamatory article was true and fair comment on the acts of a public official; and, interposed a partial defense in mitigation of damages (R. 7-14). Appended to said answers were respondents' demand for a jury trial (R. 14).

Subsequently, respondents filed a motion for judgment on the pleadings, said motion being bottomed on the contention that the complaint did not state a claim against respondents upon which relief could be granted in that the publication complained of was not libelous *per se* and no special damages had been alleged (R. 15).

The trial court handed down no written opinion in the case, but by order dated April 11, 1941, granted respondents' motion for judgment on the pleadings (R. 16).

From the said order of the trial court, your petitioner appealed to the Court of Appeals for the District of Columbia and that court, in an opinion dated May 25, 1942, affirmed the lower court's action (R. 18-20). As will be hereinafter shown, in our brief in support hereof, the Court of Appeals summarily dismissed as not being in point, all

applicable precedents, and decided the issue upon the decision in but a single case and in which it had been held by the court that the complainant in libel "had patriotically sought to have eliminated from the public schools textbooks containing what he regarded as anti-patriotic or pro-communistic matter—a highly commendable effort on his part."* The manifest error of the Court of Appeals in making "a highly commendable effort" analogous to a false charge of anti-Semitism can be deemed no less than most extraordinary.

Moreover, the Court of Appeals for the District of Columbia completely ignored the findings of the Court of Appeals for the Second Circuit, recently affirmed by this Court, in a suit in which the article complained of was substantially the same as in the case at bar.**

A petition for a rehearing was duly filed, and was denied by the Court of Appeals on June 30, 1942 (R. 31).

STATEMENT AS TO JURISDICTION.

Jurisdiction is conferred upon the Supreme Court by Section 240(a) of the Judicial Code, as amended [28 U. S. C. A., Section 347(a)]. The decision of the Court of Appeals for the District of Columbia was handed down on May 25, 1942, and will be found at pages 18 to 20 of the Record. A petition for rehearing was denied on June 30, 1942 (R. 31).

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* *Sullivan* v. *Meyer*, 67 App. D. C. 228, 229.

** *Sweeney* v. *Schenectady Union Pub. Co.*, 122 F. 2d 288, aff'd., by the Sup. Ct. —— U. S. ——, 86 L. Ed. 867, rehearing denied, —— U. S. ——, 86 L. Ed. 1023.

QUESTIONS PRESENTED.

I.

The article complained of by petitioner is libelous *per se*, and special damages are not required to be pleaded or proved.

II.

The right of every citizen, whether he be a public official or not, to a decent reputation when he has done nothing to cause it to be otherwise, is a property right, protected by the Constitution and for an unjust invasion of which he is entitled to compensation.

III.

If the meaning of the publication is doubtful—one meaning being libelous, the other non-libelous—the question is one for the jury to decide.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The opinion of the Court of Appeals for the District of Columbia is contrary to all applicable local decisions and is in conflict with decisions of this Court and with a recent decision by the Court of Appeals for the Second Circuit as affirmed by this Court.

II.

The enactment of a rule of liability demanding a showing of *gross* immorality or *gross* incompetence with respect to libels on public officials, in the absence of any expression as to what constitutes such excessive immorality or incompetence, is contrary to all sound public policy.

III.

The decision licensing false and vicious attacks on public officials and coming from a jurisdiction within the seat of the

nation's legislative functions, will have grave consequences and far reaching effects and should not be allowed to stand unchallenged without a review by this Court of so radical a departure from the settled law.

WHEREFORE, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia, commanding it to certify to the Supreme Court, for its review and determination on a day certain, a full and complete transcript of the record and proceedings in cause numbered and entitled on the docket, No. 7932, Martin L. Sweeney 1. Eleanor M. Patterson, Trading as the Washington Times-Herald, Drew Pearson and Robert S. Allen, and that the judgment of the Court of Appeals and the District Court be reversed; and that petitioner have such other and further relief in the premsies as this Court may deem proper.

Respectfully submitted,

JOHN O'CONNOR,
Counsel for Petitioner.

WILLIAM F. CUSICK,
Of Counsel.

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SUPPORTING BRIEF.

To the Honorable, the Supreme Court of the United States:

I.

OPINIONS OF THE COURTS BELOW.

No opinion was entered by the District Court, its order dismissing petitioner's cause of action appears in the record at page 16; the opinion of the Court of Appeals for the District of Columbia was handed down on May 25, 1942, and is reported at 128 F. 2d 457, and appears in the record at pages 18 to 20. Judgment affirming the action of the District Court was entered on the same day (R. 21). The petition for rehearing was denied on June 30, 1942 (R. 31).

II.

JURISDICTION.

Jurisdiction is conferred on the Supreme Court by Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. 347(a)). Jurisdiction is invoked on the grounds:

(a) The Court of Appeals for the District of Columbia has decided a question of paramount importance not only for its alarming effect on all public officials but for its general significance in the highly controversial field of the law of libel as well.

(b) A decision by this Court will have a determinative effect on litigation presently pending in a number of Courts and involving the publication of the identical article as here in issue. The result would accomplish a "just, speedy, and inexpensive determination of every action", as contemplated by the spirit and letter of the rules of civil procedure for district courts as recently promulgated by this Court.

(c) The opinion of the Court of Appeals is in conflict not only with all applicable local decisions but also with decisions of this Court and with the rule as announced by the Court of Appeals for the Second Circuit and as affirmed by this Court in a substantially identical case.

III.

STATEMENT OF THE CASE.

The facts set forth in the statement contained in the petition are sufficient for the purposes of the brief, and for the purposes of brevity are not repeated here.

IV.

SPECIFICATIONS OF ERROR.

1. The Court of Appeals erred in failing to hold that the published article was libelous *per se*.

2. The Court of Appeals erred in interpreting the accusations to connote less than *gross* immorality or *gross* incompetence.

3. The Court of Appeals erred in assuming that anyone, including respondents, may defend an interest by hurling false and disgraceful statements of fact at a public official, *because he is a public official.*

4. The Court of Appeals erred in holding that false, injurious and disgraceful statements of fact, when charged to a public official, are unredressable unless there is a showing of economic loss.

5. The Court of Appeals erred in failing to take proper cognizance of decisions of this Court and of an opinion of the Second Circuit Court of Appeals, as affirmed by this Court, which involved substantially the same article.

6. The Court of Appeals erred in failing to reverse the District Court and send the cause back for trial on the merits.

ARGUMENT.

I.

The Publication Falsely Accuses Petitioner of Religious and Racial Hatred in His Official Office.

(a) Unambiguous meaning of the words complained of.

The article charges petitioner with being a part of "a hot behind-the-scenes fight" in Congress "to prevent the appointment of a Jewish judge"; the proposed appointee being one Emerich Burt Freed who was "on the verge of being elevated to the U. S. District Court"; that Congressman Sweeney's "violent opposition" had been aroused, and the

"basis" of his opposition was the *fact* that "Freed is a Jew, and one not born in the United States". After reciting these *statements of fact,* the article concludes with the further *statement of fact* that, "Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment." (R. 5-6.)

As is readily seen, the alleged reasons advanced for petitioner's opposition to Freed were not that the candidate was unqualified for office, but squarely on the point that *he was a Jew and a Jew not born in this country.*

The inescapable import of the words is that petitioner opposed the appointment of a man because he was a Jew. Whether the word "Jew" was intended by the respondents to mean the race or the religion is unimportant. The term is unqualified and in ordinary common parlance is accepted to mean either race or religion, or both. The natural and normal inference to be drawn from the fact that a man is opposed to the appointment of a person to office because that person is a Jew, is that such man is prejudiced against Jews, is bigoted, or dislikes Jews because they are Jews,—or, in everyday language, he is a "Jew-hater." It is to be noted that the opposition of Mr. Sweeney is said to be "violent", indicating that his prejudice, bigotry and hatred are fanatically severe.

(b) Religious and racial intolerance condemned by all right-thinking people.

In refusing to consider the above publication of disgraceful facts, to constitute words *per se* actionable, the Court of Appeals observed that "political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen." We have searched in vain not only the judicial decisions, but the public periodicals for an indication that "some respectable people approve" of anti-Semitism and our research only tends to unqualifiedly reject as error such an assumption.

Circuit Judge Chase in *Sweeney* v. *Schenectady Union Pub. Co.*, (C. C. A. 2d), 122 F. 2d 288, 290, affirmed —— U. S. ——, 86 L. Ed. 867; rehearing denied —— U. S. ——, 86 L. Ed. 1023, recognized that some people might approve of anti-Semitism, but it is clear from the following that such people could not be termed "respectable":

> "This plaintiff by being accused of trying to deprive a man of an appointment to public office because, presumably both in race and religion, he was Jewish would, intolerance being what it is, no doubt gain approval and increased respect in some quarters; and in others where only the hit bird flutters, there would be indifference; but in a country still dedicated to religious and racial freedom decent, liberty-loving people still are present in great numbers and still are greatly offended by the narrow-minded injustice of bigots who see individuals only en masse and condemn them merely because their ancestors were of a certain race or they themselves are of a certain religion. Those who hate intolerance are prone to regard the person who believes in and practices acts of intolerance with aversion and contempt. And in these times when it is universal knowledge that one foreign dictator gained his power by practices which included large-scale, unreasonable Jewish persecutions which have played an important part in making his name an anathema in many parts of this country the publication of statements such as those alleged may well gain for the person falsely accused the scorn and contempt of the right-thinking in appreciable numbers."

The effects of a charge of religious and racial bigotry—at least in this country—is a matter of universal knowledge. All the common modes of expression have been enlisted to denounce, and rightfully so, the intolerant. One concrete example appears in a recent and widely circulated article entitled "What We Are Fighting For," written by Mrs. Franklin D. Roosevelt, (American Magazine, July 1942, Page 16). Of the reasons we are fighting the present war, Mrs. Roosevelt, a representative citizen, states one as being "Freedom from racial and religious discrimination."

If religious and racial discrimination is not considered by the public as "grossly immoral", why would we be involved in a mortal struggle to help to eradicate it?

(c) Liability is not a question of majority vote.

But, assuming that, as Judge Chase stated, "intolerance being what it is," some might not disapprove of the false accusations, this would still not relieve the respondents from liability.

As was stated by Mr. Justice Holmes, speaking for this Court in *Peck* v. *Tribune Co.*, 214 U. S. 185, 190:

> "Liability is not a question of majority vote, * * * obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about, or even known by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm * * *."

Directly in point with the case at bar, where petitioner has been deprived of a trial by jury, Mr. Justice Holmes, in the *Peck* case said:

> "It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view." (Citing cases.)

The Court of Appeals for the District of Columbia as recently as 1938, recognized and approved the doctrine enunciated by this Court in the *Peck* case. In *Meyerson* v. *Hurlbut, et al.*, 68 App. D. C. 360, an action for slander growing out of a charge that the plaintiff, a dealer in automotive

parts, had been accused of "price-cutting," Mr. Justice Edgerton (who wrote the opinion in the instant case) stated:

> "It is true that price-cutting is common and that there is no consensus against it, * * *"

but, in applying the rule laid down in *Peck* v. *Tribune Co.*, 214 U. S. 185, 190, the decision of Mr. Justice Holmes, was quoted at length and the trial court was reversed on the ground that the slander was actionable *per se*, although it was conceded that all persons might not regard a charge of being a "price-cutter" as slanderous.

II.

If the Publication Can Possibly Carry an Innocent as Well as a Disgraceful Meaning, the Question is for the Jury.

Moreover, if there be any doubt as to the libelous quality of a publication, the question becomes one for the jury to decide, and it was so held in *Meyerson* v. *Hurlbut, et al.*, 68 App. D. C. 360, where again Mr. Justice Edgerton stated:

> "If language is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say under all the circumstances surrounding its publication, including extraneous facts admissable in evidence, which of the two meanings would be attributed to it by those to whom it is addressed, or by whom it may be read."

And,

> "It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense, that the court can rule, as a matter of law, that the publication is not libelous."

Yet, the same court in an opinion written by the same jurist concludes that a *false* charge of anti-Semitism, hurled nation-wide at a public official while performing his official duties, is of so light a nature as to preclude any possibility

of the words being libelous unless an economic loss was shown! The Court of Appeals ignored completely the principles expounded by this Court in the *Peck* case.

This, notwithstanding the existence of the President's Committee on Fair Employment Practice and numerous other committees and associations founded in recent years to combat religious and racial intolerance!

It may also be noted that the *Meyerson* case involved only a charge of oral defamation, always recognized as the lesser of the evils of libel and slander. Again, the Court of Appeals has not followed the guidance of this Court in another respect. The fundamental distinction in the law of libel overlooked by the Court of Appeals was pointed out by Mr. Justice Clifford in *Pollard* v. *Lyon*, 91 U. S. 225, 228, wherein he said:

> "* * * there is a marked distinction between slander and libel and that many things are actionable when written or printed and published which would not be actionable if merely spoken, * * *"

Again, in *White* v. *Nicholls, et al.*, 44 U. S. 266, Mr. Justice Daniel, speaking for the court, said:

> "With regard to that species of defamation which is effected by writing or printing, or by pictures and signs, and which is technically denominated libel, although in general the rules applicable to it are the same which apply to verbal slander, yet in other respects it is treated with a sterner rigor than the latter; because it must have been effected with coolness and deliberation, and must be more permanent and extensive in its operation than words, which are frequently the offspring of sudden gusts of passion, and soon may be buried in oblivion."

See also, Mr. Justice Cardozo's opinion in *Ostrowe* v. *Lee*, 256 N. Y. 36.

III.

The Rule Enunciated by the Court of Appeals is Contrary to All Applicable Local Decisions, and is in Conflict with the Overwhelming Weight of Authority in this Country as Well as England.

(a) The established local law Disregarded.

It has long been held that any written or printed statement or article published of or concerning another, which is false and tends to injure his reputation, and thereby expose him to public hatred, contempt, scorn, obloquy, or shame, is libelous *per se.*

> "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to defer third persons from associating or dealing with him." *Restatement of the Law of Torts,* Vol. 3, Sec. 559.

In the matter of libels on public officials, it is said:

> "Words charging misconduct in office, want of official integrity or fidelity to public trust, words inconsistent with the due fulfillment of official duty, words which tend to deprive an official of his office, and words which are likely to produce public contempt and the reprobation of right minded men are libelous per se." L. R. A. 1918, E. P. 23.

Of the number of suits brought by your petition in other jurisdictions and all stemming from substantially the identical publication as here in issue, the various courts, where the question of liability was tested, have evidenced a difference of opinion as to the libelous quality of the words complained of. This case is, however, governed by the law of the District of Columbia. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

With unvarying consistency the courts of this jurisdiction have followed the great weight of authority in holding that words published falsely which tend to expose the individual,

whether he be public official or private citizen, to any of the evil results catalogued in the general statements above are libelous *per se.* See *Lane* v. *Washington Daily News,* 66 App. D. C. 245; *Washington Times Co.* v. *Bonner,* 66 App. D. C. 280; *A. S. Abell Co.* v. *Ingham,* 43 App. D. C. 582; *Ashford* v. *Evening Star Newspaper Co.,* 41 App. D. C. 395; *Washington Herald Co.* v. *Berry,* 41 App. D. C. 322; *Poston* v. *Washington A. & Mt. V. R. Co.,* 36 App. D. C. 359; *Russel* v. *Washington Post Co.,* 31 App. D. C. 277; *Washington Gaslight Co.* v. *Lansden,* 9 App. D. C. 508; *Bailey* v. *Holland,* 7 App. D. C. 184.

A publication which is claimed to be defamatory must be read in the sense in which readers to whom it is addressed would ordinarily understand it. *Lane* v. *Washington Daily News,* 66 App. D. C. 245; *Meyerson* v. *Hurlbut,* 68 App. D. C. 360.

And, where a publication is libelous on its face, the action is maintainable without either allegation or proof of special damages.

> "It is elementary that in such event special damages neither be alleged nor proved. The law presumes some damage." *Washington Times Co.* v. *Bonner,* 66 App. D. C. 280, and cases there cited.

The Court of Appeals for the District of Columbia, as far back as 1895, took cognizance of the implied damage resulting in a false charge of racial antipathy. In *Bailey* v. *Holland,* 7 App. D. C. 184, the court held that a letter, accusing a colored government employee of treachery to his race, and of working against their interest, written to a senator to whom he owed his appointment, was libelous *per se.*

The recent decision in *Washington Times Co.* v. *Bonner,* (1936), 66 App. D. C. 280, aptly illustrates the law of libel as it has heretofore existed in the District of Columbia—at least until the present decision by the Court of Appeals. In the *Bonner* case, the plaintiff was a public official—Executive Secretary of the Federal Power Commission. There

were five separate publications in issue and *each of which* the court sustained as warranting the jury's verdict. The *separate* claims consisted of accusations that Bonner had been "slipped" into the post as Executive Secretary of the Power Commission by certain power interests; that he had taken letters from the official files showing those who recommended him for the position; that, he had violated his duty as an officer of the United States; and, that because of the above matters, he had been eliminated as a delegate to a World Power Conference for which he had been previously selected. It is conceded that there can be no question as to the libelous quality of the words charging an attempt to steal official letters, but the court also held the four remaining publications, which did *not charge a crime,* to be libelous *per se,* on the grounds that they held plaintiff up to ridicule, hatred and contempt.

Certainly if the charges in the *Bonner* case, *and each of them,* were sufficient to satisfy the requirements for a libel *per se,* then how much the more so are the charges contained in case at bar?

Even a cursory examination of the decision in the *Bonner* case, heard before a *full bench* of the Court of Appeals, illustrates at once the correctness and soundness of the court's reasoning, particularly so when placed in contrast to the instant case. Mr. Justice Stephens, speaking for the court in the *Bonner* case, specifically singled out the case of *Coleman* v. *McLennan,* 78 Kan. 711, 98 Pac. 281 (which the court in its decision herein cited for authority), as the leading decision representing a *minority view* in holding that fair comment of public officials may extend to misstatements of fact. In refusing to follow such a view, Mr. Justice Stephens said:

> "But the great weight of authority in the state courts, and the rule in the Federal courts, is to the contrary—that the right of fair comment *does not extend to misstatements of fact.* More than a score of the state courts take this view." (Italics supplied.)

He cites and quotes with approval from Mr. Justice Holmes' opinion in *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1*, and Judge Taft's (later Chief Justice of this Court) opinion in *Post Publishing Co.* v. *Hallam*, (C. C. A.), 59 F. 539, and observed that the rule was quoted with approval in *Russel* v. *Washington Post Co.*, 31 App. D. C. 277; in *Ashford* v. *Evening Star Newspaper Co.*, 41 App. D. C. 395; and in *A. S. Abell Co.* v. *Ingham*, 43 App. D. C. 582, the Court of Appeals applied the rule. He states that in the *Ingham* case "the contrary view was not seriously urged, and we did not discuss the authorities; hence we have in the instant case considered the question anew and have examined with care the leading cases, including those cited by the defendant, and we feel constrained to follow the majority rule as the better view."

Notwithstanding the thorough consideration given to the question of libels on public officials by a full Bench of the Court of Appeals in the *Bonner* case, the court predicated its opinion in the instant case on a decision not only *not involving a public official*, but one which it is submitted is not in the remotest manner analogous to the facts herein presented.

The plaintiff in *Sullivan* v. *Meyer*, 67 App. D. C. 228, which the Court of Appeals held "more than covers the present case," was a private individual who had injected himself into a controversy relative to the use, in the public schools of the District of Columbia, of textbooks which he alleged contained Communistic teachings. The defendant merely published *comment* relating to the merits of the plaintiff's contentions before the School Board, and asserted that they were "farcical". The *facts upon which the comment was based were concededly true.* But, Sullivan's action was not predicated on the *facts*, but on the *comment*

* The Court of Appeals in the case at Bar cites as authority for its erroneous position the earlier case of *Sillars* v. *Collier*, 151 Mass. 50, 23 N. E. 732, (R. 19n), which is not only not in point, but in view of the later decision in the *Burt* case, it is not the law of Massachusetts.

and criticism that legitimtely flowed from the facts. Consequently, the decision followed the well established rule that comment and criticism, though false, is not actionable *per se,* when based on facts truly stated.

In the instant case there are no *facts truly stated,* in reference to Representative Sweeney, and it is conceded that the charges directed at him were *false.* The difference between the two cases is more than obvious. See *Washington Times Co.* v. *Bonner,* 66 App. D. C. 280, *A. S. Abell Co.* v. *Ingham,* 43 App. D. C. 582; *Ashford* v. *Evening Star Newspaper Co.,* 41 App. D. C. 395; *Russel* v. *Washington Post Co.,* 31 App. D. C. 277; all holding that comment and criticism does not extend to false statements of fact.

Moreover, the Court of Appeals in the *Sullivan* case stated:

> "In the present case the plaintiff had patriotically sought to have eliminated from the public schools textbooks containing what he regarded as anti-patriotic or pro-communistic matter—a highly commendable effort on his part."

It surely cannot be the view of the Court of Appeals or of any court under which an enlightened people live, that Representative Sweeney's alleged opposition to Mr. Freed because the latter was a Jew, constituted a "patriotic" gesture, or was "a highly commendable effort on his part"; nor can we accede to the court's view that the *Sullivan* case "more than covers the present case."

(b) The rule stated by the Supreme Court.

The decision of the Court of Appeals runs directly counter to the decision of this Court in *White* v. *Nicholls, et al.,* 44 U. S. 266, in which both the American and English authorities, as applicable to public officials, were exhaustively examined. While it is true that the plaintiff, in the *White* case had been removed from office as Collector of Customs in the District of Columbia, the principles expounded in

the decision are eminently applicable to the case at bar.* Mr. Justice Daniel, in speaking for this Court, said (page 285):

> "How far, under an alleged right to examine into the fitness and qualifications of men who are either in office or are applicants for office—or, how far, under the obligation of a supposed duty to arraign such men either at the bar of their immediate superior, or that of public opinion, their reputation, their acts, their motives or feelings may be assailed with impunity—how far that law, designed for the protection of all, has placed a certain class of citizens without the pale of its protection? The necessity for an exclusion like this, it will be admitted by all, must indeed be very strong to justify it; *it will never be recognized for trivial reasons, much less upon those that may be simulated or unworthy.* If we look to the position of men in common life, we see the law drawing providently around them every security for their safety and their peace. It not only forbids the imputation to an individual of acts which are criminal and would subject him to penal infliction; but, regarding man as a sympathetic and social creature, it will sometimes take cognizance of injuries affecting him exclusively in that character. It will accordingly give a claim to redress to him who shall be charged with what is calculated to exclude him from social intercourse; as, for instance, with being the subject of an infectious, loathsome, and incurable disease. The principle of the law always implying injury, wherever the object or effect is the exposure of the accused to criminal punishment or to degradation in society. These guardian provisions of the law, designed, as we have said, for the

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* The Court of Appeals in the instant case suggested but did not decide that petitioner "might be entitled to relief" if he had lost his seat in Congress (R. 19). The shallowness of such reasoning may readily be seen from the fact that the statute of limitations in libel actions in this jurisdiction is *one year* [District of Columbia Code, Title 24, Ch. 12, Sec. 341 (1929 Ed.)], whereas a term in Congress runs two years. As the decision is applicable to all public officials, the general impossibility of such a showing in the matter of United States Senators having a term of six years is even more obvious!

security and peace of persons in the ordinary walks of private live, *appear in some respects to be extended still farther in relation to persons invested with official trusts.* Thus it is said that words not otherwise actionable may form the basis of an action when spoken of a party in respect of his office, profession or business. (*Ayston* v. *Blagrave,* Strange, 617, and 2 Ld. Raym., 1369). Again, in *Lumby* v. *Allday* (1 Crompt. & Jarv., 301), where words are spoken of a person in an office of profit, which have a natural tendency to occasion the loss of such office, or which impute misconduct in it, they are actionable. And this principle embraces all temporal offices of profit or trust, without limitation." (Italics supplied.)

And in reversing the Circuit Court for the District of Columbia, this Court concluded: (page 291)

"The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto: 1. That every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made. Proof of malice, therefore, in the cases just described, can never be required of the party complaining beyond the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. 2. That the description of cases recognized as privileged communications, must be understood as exceptions to the rule, and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general rule of the law is deduced. The rule of evidence, as to such cases, is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situation of the parties, and to require of him to bring home to the defendant the existence of malice as the true mo-

tive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms. We conclude, then, that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribunal or authority, although such court, legislative body, or other tribunal, may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding, addressed to such tribunal, will render that publication, petition, or proceeding, libelous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. And we think that in every case of a proceeding like those just enumerated, *falsehood and the absence of probable cause will amount to proof of malice.*"* (*Italics supplied)

(c) The English rule directly in accord with Petitioner's contentions.

A shown under Point I(a) herein, the publication accused petitioner in unambiguous terms of religious and racial intolerance in connection with his official duties as a Representative in Congress. It charged that the basis of his opposition to a qualified appointee for judicial office was the fact that the candidate was of Jewish origin. There can be no mistake, but that the article held petitioner out as being—what the general public points to—a "Jew-hater". A search of the American authorities fails to disclose, at least until the present litigation, a precedent involving the exact charge. However, the Court of Appeal in England recently passed on a case which seems to be squarely in point. The case is *De Stempel* v. *Dunkels*, (1938), 1 All. E. R. 238, 54 T. L. R. 289, and involved the charge of being a "Jew-hater."

The action was for slander and breach of contract. Plaintiff, Baron Victor De Stempel, was married to the stepdaughter of the defendant, Walter Dunkels, a member of the

Jewish faith. The defendant was a member and leading director of the Diamond Corporation of England, and his cousin Otto Dunkels, the employer of the plaintiff, was head of the Corporation. Differences arose between the plaintiff and his wife (Walter Dunkel's stepdaughter), ultimately resulting in the defendant lodging accusations against plaintiff with Otto Dunkels. Among the charges made was "Victor is a Jew-hater." For our purposes here, this need be the only accusation considered.

At the trial, the jury found the statement "Victor is a Jew-hater" to be defamatory and awarded damages.

When the trial judge overruled the verdict, the Court of Appeal held that to say "Victor is a Jew-hater" was defamatory *per se* and special damages need not be pleaded, or shown. (It is interesting to note that defendant's counsel, while he differed on other points observed that he "could not contend that the words, 'Victor is a Jew-hater' were not capable of a defamatory meaning.").

While dissenting on certain issues of the case, Slesser, L. J., indicated his accord with the holding that the words complained of were defamatory *per se,* when he said:

> "As to this alleged slander, Sir Patrick Hastings (def's. counsel) admitted that, in the primary sense, it was capable of a defamatory meaning. He said that he was constrained to agree with the view, which I had expressed during the argument, that to say of any man that he was a 'hater' of any person or class of persons was capable of a defamatory meaning. Hatred of anything but wickedness may well be considered to be a vice or a sin. In the Litany where a public recognition of morality and social obligation may properly be sought, there is prayer for delivery from hatred, malice, and all uncharitableness, and, in a Christian country such as England, to say that a man is possessed of hatred is, in my opinion, 'likely to tend to lower him in the estimation of right-thinking members of society generally,' to quote the test mentioned by Lord Atkin in Sim v. Stretch (1936, 2 All. E. R. 1237). In Ireland it has been held defamatory to say of a man that he is intolerant:

Teacy v. McKenna (1869, I. R. 4 C. L. 374). In New Zealand, it has been held defamatory to say of a man that he has been guilty of unbrotherly conduct: Campbell v. Payton (1889, 17 N. Z. L. R. 91). I would add to the category the statement that a man is afflicted by hatred."

On the same question, Scott, L. J., stated:

"I deal first with the slander alleged in para. 7 of the statement of claim: 'Victor is a Jew-hater.' Sir Patrick Hastings (def's. counsel) felt himself unable to argue that these words were incapable of a defamatory meaning. Both the senior members of the court agree with Sir Patrick, and so do I. *The words seem to me obviously defamatory.* To say that a man hates a particular race or class of people is to allege, at the very least, a character which is warped and unlikely to be impartial." (Italics supplied.)

It is worthy to note that the *De Stempel* case involved but a charge of slander, whereas in the case at bar the disgraceful charges have been given permanence in print. The distinction marking libel as greater of the two evils, referred to in Point II herein, makes the above case an *a fortiori* one in support of petitioner's contentions.

It seems inconceivable that the capital city of a great democracy, with a Jewish population of over four and a half millions is, on the one hand offering succor and assistance to the oppressed of all lands, of all creeds and races, and on the other extending judicial license to the propagators of false statements charging a reputable public official with religious and racial hatred.*

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* According to the "Jewish Statistical Bureau of Synagogues of America" (1937), the Jewish population in the United States is 4,770,647; whereas in England the Jewish population is only slightly in excess of 300,000.

CONCLUSION.

Although this is a controversy between private parties, the questions involved are most important, and in our opinion, should be settled by the Supreme Court.

Your petitioner therefore, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia, in order that the case may be subject of review and determination by this Court, and the judgment of the lower courts be reversed.

Respectfully submitted,

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WILLIAM F. CUSICK,

Of Counsel.

(34)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 434.

MARTIN L. SWEENEY, *Petitioner,*

v.

ELEANOR M. PATTERSON, Trading as the Washington Times-Herald, DREW PEARSON and ROBERT S. ALLEN.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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JURISDICTION.

The sole question presented by the petitioner, howsoever stated by him, is whether the judgment of the Court of Appeals for the District of Columbia affirming the judgment of the District Court of the United States for the District of Columbia, in favor of respondents, presents a question or questions of law of public interest and general importance which should be decided by this Court.

ARGUMENT.

The decision of the Court of Appeals merely declares the common law of the District of Columbia in an action of libel. Petitioner concedes that the case is governed by the law of the District of Columbia (Pet. br. p. 15), citing *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. There is no suggestion in the present case, as there was in the recent

case of *Sweeney* v. *Schenectady Union Publishing Co.*, 122 F. 2d 288, 86 L. ed. 867, 1023, in which this Court granted certiorari to the Circuit Court of Appeals for the Second Circuit, that the local law, if correctly declared in the decision challenged, is in derogation of the Constitutional guarantees of freedom of speech and of the press.

In the case of *Del Vecchio* v. *Bowers*, 296 U. S. 280, 80 L. ed. 229, 232, this Court distinctly ruled that a case of this kind from the Court of Appeals of the District of Columbia is not reviewable, stating:

> "In the view that the case does not fall within Rule 38, the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited *or which declare the common law of the District.* The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application. We therefore granted the writ because of the important question as to the effect of Sec. 20 (d)." (Italics supplied)

The rule of this Court in regard to certiorari to the Court of Appeals for the District of Columbia is, moreover, different in one important respect from the rule in regard to certiorari to the Circuit Courts of Appeals. Certiorari to the latter courts, as stated in *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 205, 206, is granted in order to secure uniformity of decision by those courts in matters concerning which the Federal courts in the several states have a right to independent judgment. Certiorari in *Ruhlin* v. *New York Life Insurance Co.* was granted upon a showing of a probable conflict of decisions in what appeared to be such a matter. In disposing of the case, however, the Court found that the issue before it was one of state law, and it declined to decide that issue. It stated

that had *Erie Railroad Co.* v. *Tompkins* been announced at some prior date, this Court might not have issued a writ of certiorari. It added that as to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari, and that the conflict may be merely corollary to a permissible difference of opinion in the state courts.

Petitioner argues at length that the Court of Appeals did not follow its own prior decisions. The question whether it did or did not adhere to its former rulings with reference to the local law of the District of Columbia does not present a case for review by certiorari in accordance with the rule stated by this Court in the decision cited above. This case does not involve a statute national in its scope nor any other matter as to which a decision of this Court would constitute "a precedent of general application."

Petitioner has, in any event, entirely failed to establish his point. Of the nine cases cited by petitioner (Pet. br. p. 16) as showing the rule of law heretofore followed by the Court of Appeals, only three related to the official conduct of public officials. In two of these three cases, *A. S. Abell Co.* v. *Ingham* [1] and *Washington Times Co.* v. *Bonner*,[2] as noted by the Court (R. p. 20), officials were falsely charged with crime or gross immorality; in the third, *Ashford* v. *Evening Star Newspaper Co.*,[3] the Court of Appeals affirmed the judgment of the trial court directing a verdict for the defendant upon a plea of privilege supported by evidence of truth of the publication. In five of the other six cases cited by petitioner in this connection (Pet. br. p. 16), a Government employee was falsely charged with dishonorable conduct in his private capacity;[4] a former employee of a private concern was falsely reported to have

[1] 43 App. D. C. 582.
[2] 66 App. D. C. 280, 86 F. 2d 836.
[3] 41 App. D. C. 395.
[4] *Bailey* v. *Holland*, 7 App. D. C. 184.

testified falsely in certain proceedings;[5] a clergyman was falsely accused of immoral acts;[6] a "private person who had resigned from public office" was referred to, in a newspaper, as a "disgruntled fanatic, deposed from his office" for good and sufficient reasons and getting off easy when he was simply deposed and nothing more was said concerning the manner in which he had filled his office;[7] and there was a false statement the natural meaning of which was that plaintiffs were gangsters.[8] In *Poston* v. *Washington, Alexandria & Mt. V. R. Co.*,[9] the question before the Court was whether the publication of a grand jury report was privileged, and the Court specifically stated that the discussion of other questions was unnecessary.

Petitioner does not show to this Court that the question decided by the Court of Appeals in the present case was ever presented to that Court prior to the date of the case of *Sullivan* v. *Meyer*,[10] which, the Court held, more than covers the present case (R. p. 20). In *Sullivan* v. *Meyer* the Court of Appeals affirmed the judgment of the court below sustaining a demurrer. The decision was not based upon the privilege of fair comment which might excuse a publication not otherwise excusable. It was based upon the non-libelous character of even "false and distorted statements" relating exclusively to the plaintiff's attitude towards a question of public interest and not impugning his character or motives. Similarly, in the present case the Court of Appeals, affirming the judgment of the lower court which had dismissed the complaint for failure to state a cause of action, did not consider whether the publication complained of was privileged but found merely that, even if false, it was not libelous *per se* (R. pp. 19, 20). The

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[5] *Washington Gaslight Co.* v. *Lansden*, 9 App. D. C. 508.

[6] *Russell* v. *Washington Post Co.*, 31 App. D. C. 277.

[7] *Washington Herald Co.* v. *Berry*, 41 App. D. C. 322, 325, 339, 340.

[8] *Lane* v. *Washington Daily News*, 66 App. D. C. 245, 85 F. 2d 822.

[9] 36 App. D. C. 359, 371.

[10] 67 App. D. C. 228, 229, 91 F. 2d 301.

Court had no occasion to consider the action which might be appropriate on the part of the trial court in a case such as *Meyerson* v. *Hurlbut*, 68 App. D. C. 360, 98 F. 2d 232, in which the publication sued upon was "capable of two meanings, one of which may be libelous and actionable and the other not."

The Court of Appeals, in deciding the question presented in this case, did not act without the light available from decisions of other courts applying the common law in their respective jurisdictions. The Court of Appeals cited (R. p. 19, n. 2) decisions of the highest courts in five states as supporting its view that to publish erroneous and injurious statements of fact and injurious comment or opinion regarding the political conduct and views of public officials, so long as no charge of crime, corruption, gross immorality, or gross incompetence is made and no special damage results, is not "libelous *per se*." The authority of those decisions as statements of the law of the jurisdictions in which they were made cannot be seriously questioned. The Court of Appeals also cited decisions of the courts of last resort in Tennessee and Ohio (petitioner's home state) and decisions of the United States Circuit Court of Appeals for the Third Circuit and the United States District Courts in Texas and Idaho, all holding the identical article here sued upon to be not libelous. It referred to the fact that the Court of Appeals for the Second Circuit by a divided vote, in *Sweeney* v. *Schenectady Union Publishing Co.*, 122 F. 2d 288, had held that the article was libelous *per se* under the law of New York, and that an even division in the Supreme Court had sustained that result. It did not call attention to the fact, which will appear upon comparison of the article sued upon herein (R. pp. 5-6) with the article sued upon in *Sweeney* v. *Schenectady Union Publishing Co.*, that the latter article does not contain a paragraph which is included in the article here sued upon, to the effect that two candidates for the vacant judicial appointment at Cleveland, Ohio, had been eliminated from consideration by the Department of Justice because of big

business or reactionary connections and that a third candidate had been eliminated because he happened to be a Catholic and the last two judicial appointments in Ohio had been Catholics. It is pertinent to add that in a decision made subsequent to the date of the decision of the Court of Appeals for the District of Columbia, the Circuit Court of Appeals for the Tenth Circuit held, in *Sweeney* v. *Anderson, et al.,* 129 F. 2d 756, 758, affirming the dismissal of nine of petitioner's suits for want of prosecution, that a decision of the Circuit Court of the Second Circuit could not be determinative of the question whether the article sued upon was libelous *per se* under the law of Kansas.

Petitioner urges as pertinent (Pet. br. pp. 22-24) the case of *DeStempel* v. *Dunkels,* 54 Times Law Reports 289 (1938), in which the English Court of Appeal held it to be libelous to say of the plaintiff: "Victor is a Jew-hater." The decision in that case was not appealed to the House of Lords and is, therefore, not the decision of the highest court in England. The sole question which the judges in the court below had to decide with respect to the words used was "whether they were actionable as words which related to the plaintiff in his business or occupation." (Op. cit., p. 291). It appears that a certain corporation which was practically the only source from which the plaintiff's employer then drew or could expect in the future to draw its income was owned by Jews to the extent of 85 per cent and that all of the leading men in it were Jews (Op. cit., p. 299). The statement that a man whose livelihood depends on friendly relations with Jews is a "Jew-hater" has evidently a very different significance from the statement in the article here sued upon that a candidate for a judicial appointment in a certain District was opposed by a member of Congress from the same District for the reason that he was a Jew and one not born in this country. It may be noted that according to Halsbury's *Laws of England,* 2nd Ed., by Lord Hailsham, Vol. 20, pp. 397-398, it is generally useless and often misleading to quote authorities to show that particular words have been held in particular cases to

be defamatory; since the meaning of particular words may vary with the context and the circumstances in which they are published.

The case of *DeStempel* v. *Dunkels* was specifically brought to the attention of the Court of Appeals for the District of Columbia in the petition for rehearing filed with that Court by petitioner (R. p. 28). That case could of course, have no more than persuasive authority in the District of Columbia. There is no rule of law that requires the Court of Appeals of the District of Columbia to substitute for its own judgment as to the common law the judgment formed by an English court in the year 1938. Reference is made in this connection to the statement of this Court in *Funk* v. *United States,* 290 U. S. 371, 383, that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions".

Petitioner argues, further, that certiorari should be granted on the ground that the decision of the Court of Appeals is in conflict with decisions of this Court (Pet. br. p. 8). It is respectfully submitted that this ground is untenable. There is no applicable decision of this Court.

The cases in this Court relied upon by petitioner are *Pollard* v. *Lyon, Peck* v. *Tribune Co.,* and *White* v. *Nicholls.*

Pollard v. *Lyon,* 91 U. S. 225, 228, only points out the well-recognized distinction between the actionable quality of words spoken and words written or printed. That question was not involved in the present case.

Peck v. *Tribune Co.,* 214 U. S. 185, involved the publication of an advertisement which, by use of a picture of the plaintiff, attributed to the plaintiff, a woman, the constant use of pure malt whiskey over a period of years. The case arose at a time when undoubtedly the plaintiff by such an advertisement would be seriously hurt in her standing with a considerable and respectable class in the community. This Court did not discuss nor decide, in the *Peck* case, the question, decided by the Court of Appeals in the present case, whether an article relating solely to a political matter and written of a public official in relation to that matter is or is not libelous.

White v. *Nicholls*, 3 Howard (44 U. S.) 266, 285, 291, presented to this Court for decision an evidentiary question relating to the exclusion of testimony as to malice on the part of the defendant in connection with a plea of privilege. The general remarks of Mr. Justice Daniel, as observed by the Circuit Court of Appeals for the Second Circuit in *Sacks* v. *Stecker*, 60 F. 2d 73, 74 (1932), were "rendered . . . before the development of much of the modern law of libel" and "can hardly stand against an overwhelming body of authority in this country and England, where they were in no wise necessary for the decision of the question before the court."

The mere contention that a decision of the Court of Appeals for the District of Columbia is in conflict with a decision of this Court does not, of course, lay the foundation for certiorari. A substantial showing of conflict is indispensable. Such a showing petitioner has not made.

CONCLUSION.

The decision of the Court of Appeals for the District of Columbia declares the common law of the District of Columbia. The question decided is not a question of general importance which should be settled by this Court. The Court of Appeals has not failed to give effect to any applicable decision of this Court. The petition should accordingly be denied.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF.

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MARTIN L. SWEENEY, *Petitioner,*

v.

ELEANOR M. PATTERSON, Trading as the Washington Times-Herald, DREW PEARSON and ROBERT S. ALLEN.

PETITIONER'S REPLY BRIEF.

I.

Respondents seek to persuade this Court to refuse a review of the decision of the Court of Appeals for the District of Columbia on the alleged ground that the question is not one of "general importance," and contemplates only the common law of the District of Columbia (Res. Br. p. 8).

This contention is a distinct reversal of the position maintained by these same counsel (exclusive of counsel for respondent Patterson) in the case of *Sweeney* v. *Schenectady Union Publishing Company*,[1] involving the *identical accusa-*

[1] 122 F. 2d 288 (C. C. A. 2d), aff'd. Sup. Ct., 86 L. Ed. 867, rehearing denied, 86 L. Ed. 1023.

tions as here in issue, and stemming from a republication of the article authored by respondents Pearson and Allen. The record in the *Schenectady Union* case discloses that it was there contended that this Court should "not hesitate to grant review where the asserted conflict is on a point vital to the democratic process itself" (Petition for Writ of Certiorari, p. 28). And, "Again we earnestly submit that the question is one of great public importance and worthy of review" (Petitioner's Reply Brief, p. 3); and the case involved "important societal and common law issues" and was "voluntarily taken on for decision by reason of its great importance" (Petition for Rehearing, p. 3); and, "The attorneys for defendants in many other Sweeney cases join in this petition for rehearing. Though the cases involve for the most part the law of states (and the District of Columbia) other than New York, the issues of policy urged here are implicit in all of them and the fundamental common law pattern is similar; a ruling by this Court would have great persuasive effect" (id. p. 5). And again, "The national significance of the instant case and the importance of the legal issues involved were recognized by this Court when it granted certiorari and are fully developed in our Petition for Certiorari, our main brief and our Petition for Rehearing" (Petitioner's Motion for Extension of Term, etc., p. 2).

In addition, the Court of Appeals for the District of Columbia recognized that the false charges imputed to petitioner were of "general importance" and surely of great public interest when in the instant case it said (R. 19):

> "Since Congress governs the country, all inhabitants and not merely the constituents of particular members, are vitally concerned in the political conduct and views of every member of Congress."

It is hardly consonant with the ideals of democratic justice to dismiss as lacking in "general importance," or involving only the common law of a given jurisdiction, charges of religious and racial hatred attributed to a na-

tional legislative officer in the performance of his official duties. That such accusations are of great and serious importance is hardly open to question.[2]

Moreover, it may be observed that the case under consideration concerns the actual authors of the challenged article—those primarily responsible for the subsequent publication of the false charges in a vast number of newspapers throughout the country (R. pp. 11-14). It presents a far cry from the situation existing in the *Schenectady Union* case, involving as it did, merely a republisher, lacking the culpable responsibility for setting in motion nationwide publication of the false charges.

II.

Respondents' further contention that the decision of the Court of Appeals does not conflict with decisions of this Court is clearly erroneous (Res. Br. p. 7). Aside from the unmistakable import of the affirmance by this Court of the decision of the Second Circuit Court of Appeals in the *Schenectady Union* case, we have pointed out at page 12 of our main brief the opinion of Mr. Justice Holmes in the *Peck* case[3] and at pages 19-22, the thorough analysis of libels on public officials by Mr. Justice Daniel in the *White* case,[4] both of which cases eminently support petitioner's position.

The principle that "liability is not a question of majority vote" as announced in the *Peck* case is not unsound or does it render petitioner's position vulnerable because the false charges were "written of a public official" (Res. Br. p. 7). Nor does the oft cited and relied on *White* decision

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[2] In accepting a citation from the National Conference of Christians and Jews, Mr. Chief Justice Hughes stated, "Rancor and bigotry, racial animosities and intolerance * * * are the deadly enemies of true democracy, more deadly than any external force because they undermine the very foundation of democratic effort." (Reported in the Press of December 28, 1940. See Washington Post of same date.)

[3] 214 U. S. 185.

[4] 44 U. S. 266.

lose any of its pungent reasoning or become less significant because of the decision in *Sacks* v. *Stecker,* 60 F. 2d 73, upon which respondents rely (Res. Br. p. 8). They neglect to state that the *Sacks* case grew out of an alleged libelous affidavit filed in a judicial proceeding and that the Second Circuit Court of Appeals carefully distinguished the case from the *White* case saying, "* * * there the defamatory words were not published in the course of judicial proceedings, but were contained in a petition addressed by the defendant to the President and the Secretary of the Treasury requesting the removal of a collector of the port."

It may be noted further that the same Circuit Court of Appeals in the later *Schenectady Union* case upheld petitioner's contentions.

Your petitioner again respectfully submits that the issues are of major public importance and that a review and decision by this Court is essential to effectively dispel the clouds of uncertainty presently shrouding a large and material field of the law.

Respectfully submitted,

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